IN THE

Supreme Court of the United States

October Term, 1976

No. 76-988

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF WOLFSBURGER TRANSPORT-GESELLSCHAFT m.b.H. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF

HERSHEY RUBIN
CECELIA H. GOETZ
ALAN A. D'AMBROSIO
HERZFELD & RUBIN, P.C.
Attorneys for Wolfsburger Transport-Gesellschaft m.b.H. as Amicus Curiae
40 Wall Street
New York, New York 10005

INDEX

	PAGE
Motion	1
Brief	5
Introduction and Statement of Interest of *Amicus Curiae*	5
Summary of Argument	7
ARGUMENT:	
I. The statutory scheme embodied in the Shipping Act is ignored and misunderstood by the court below.	8
II. The Commission's exercise of its § 15 jurisdiction pursuant to the *Volkswagenwerk* case has benefited the maritime industry and has not prejudiced labor.	12
III. That a union signs an agreement otherwise subject to § 15 should not oust the Commission from jurisdiction.	16
IV. Section 15 jurisdiction should be held to exist wherever an agreement raises shipping problems.	20
A. The court below misapprehends the facts relevant to the "balancing test."	20
B. Agreements raising shipping problems and not entitled to a "labor exemption" should be subject to Commission jurisdiction.	23
CONCLUSION	27

Table of Cases Cited

Agreements No. T-2148 and T-2149, Pacific Maritime Association Assessment Agreements, F.M.C. Docket No. 68-18 (1969)	15

	PAGE
Agreement No. T-2336—New York Shipping Association, 15 F.M.C. 259 (1972), aff'd sub nom., Transamerican Trailer Transport, Inc. v. Federal Maritime Comm'n, 492 F.2d 617 (D.C. Cir. 1974)	15
Allen Bradley Co. v. Local 3, Int'l Brotherhood of Electrical Workers, 325 U.S. 797 (1945)	24
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966)	24
Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975)	24
Far East Conference v. United States, 342 U.S. 570 (1952)	24
Federal Maritime Comm'n v. Akiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968)	10, 24
Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726 (1973)	11, 23
Hawaiian Work Stabilization and Utilization Program ("WSUP"), Notice of Agreement Filed, 34 Fed. Reg. 6,268 (1969)	15
Local 189, Meat Cutters v. Jewel Tea Co., Inc., 381 U.S. 676 (1965)	24
Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958)	10
New Orleans Steamship Ass'n, Notice of Agreement Filed, 37 Fed. Reg. 9,054 (1972)	15
New York Shipping Ass'n v. Federal Maritime Comm'n, 495 F.2d 1215 (2d Cir. 1974), cert. denied, 419 U.S. 964 (1974)	18, 20
New York Shipping Ass'n, Man-Hour/Tonnage Assessment Formula, F.M.C. Docket No. 73-34 (1973)	15
United Mine Workers v. Pennington, 381 U.S. 657 (1965)	24
United States v. Women's Sportswear Manufacturers Ass'n, 336 U.S. 460 (1949)	24

	PAGE
United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932)	24
Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261 (1968)	2, 6, 11, 12, 13, 17, 18, 21, 22
Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 371 F.2d 747 (D.C. Cir. 1966), rev'd, 390 U.S. 261 (1968)	13, 26
Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corp., 9 F.M.C. 77 (1965), aff'd sub nom., Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 371 F.2d 747 (D.C. Cir. 1966), rev'd, 390 U.S. 261 (1968)	13, 22
West Gulf Maritime Ass'n, Notice of Agreement Filed, 37 Fed. Reg. 18,582 (1972)	15
Wolfsburger Transport-Gesellschaft m.b.H. v. Federal Maritime Comm'n, Docket No. 74-1934 (D.C. Cir.), appeal pending	2, 14

Table of Statutes Cited

Shipping Act, 1916 c.451, 39 Stat. 728, as amended, 46 U.S.C. §§ 801-842	*passim*
§ 15, 39 Stat. 733, as amended, 46 U.S.C. § 814	*passim*
§ 16, 39 Stat. 734, as amended, 46 U.S.C. § 815	3, 9, 21
§ 17, 39 Stat. 734, as amended, 46 U.S.C. § 816	3, 9, 21

Table of Other Authorities Cited

Alexander Report, H.R. Doc. No. 805, 63rd Cong., 2d Sess. (1914)	10, 16
H.R. Rep. No. 1419, 87th Cong., 2d Sess. (1962)	11

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF WOLFSBURGER TRANSPORT-GESELLSCHAFT m.b.H. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Wolfsburger Transport-Gesellschaft m.b.H. ("Wobtrans"), pursuant to Rule 42 of this Court, respectfully requests leave to file a brief *amicus curiae* in this proceeding in general support of the petitioners, the Federal Maritime Commission and the United States of America.

Wobtrans is a corporation organized and existing under the laws of the Federal Republic of Germany and is a wholly-owned subsidiary of Volkswagenwerk Aktiengesellschaft, the manufacturer of Volkswagen vehicles.

Wobtrans has taken over from its parent company the responsibility for transporting Volkswagen vehicles to this country. (For convenience, Wobtrans and its parent are at times collectively referred to herein as "Volkswagen.") Wobtrans is currently engaged in shipping vehicles to Pacific Coast ports where they are discharged by members of the Pacific Maritime Association ("PMA") operating under the agreement at the heart of this proceeding.

The jurisdiction of § 15 of the Shipping Act, 1916 (46 U.S.C. § 814) (the "Act") over cooperative working arrangements by multi-employer groups in the maritime industry was first established in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261 (1968). This was a proceeding brought by Volkswagen after an unequal and disproportionate financial burden had been imposed on automobiles by PMA. As a result of the decision in that case, the burden on automobiles was substantially reduced, although not eliminated.

Wobtrans has since participated in numerous proceedings before the Federal Maritime Commission (the "Commission" or "FMC") and the federal courts of appeals regarding similar arrangements. These cases have involved the PMA, among other organizations, and have raised both the issue of the jurisdiction of the Commission and the propriety of the assessment agreements entered into by these organizations. Currently pending before the Court of Appeals for the District of Columbia Circuit is one of these matters in which Wobtrans has challenged a PMA assessment formula. *Wolfsburger Transport-Gesellschaft m.b.H.*

v. *Federal Maritime Commission, United States of America and Pacific Maritime Association* (No. 74-1934).

Wobtrans has a real and vital interest in filing a brief *amicus curiae* in opposition to the decision below. That decision would in effect restore to multi-employer groups the arbitrary and unregulated power they exercised prior to *Volkswagenwerk*. It would exempt their cooperative working arrangements from the supervision of the Commission, provided only that such arrangements were incorporated into an agreement to which a union was a signatory. With the cooperation of a maritime union, these groups would be free once again to place disproportionate burdens on Volkswagen and other cargoes and carriers not represented within the councils of these groups, or forming a minority of their membership.

As a shipper of cargo to the pacific coast ports and other ports of the United States, Volkswagen belongs to the class of persons the Commission was created to protect. To the extent that agreements in the maritime industry are removed from surveillance by the Commission, and taken outside §§ 16 and 17 of the Shipping Act, the protection given Volkswagen by the Shipping Act against discriminatory treatment is reduced.

Accordingly, Wobtrans seeks leave to file this brief as *amicus curiae* to urge this Court to reject a construction of the Shipping Act which would substantially erode the jurisdiction established in *Volkswagenwerk* and emasculate the Shipping Act. It is hopeful that the considerations it will place before this Court will assist it in resolving the issues presented by the grant of a writ of *certiorari*.

Wobtrans has been advised that petitioners and the respondent ports have no objection to its filing a brief *amicus curiae*. However, respondent PMA and other respondents in this proceeding have not consented.

WHEREFORE, it is respectfully requested that Wobtrans be granted leave to file a brief *amicus curiae*.

Dated: New York, New York
May 31, 1977

Respectfully submitted,

HERBERT RUBIN
CECELIA H. GOETZ
ALAN A. D'AMBROSIO
HERZFELD & RUBIN, P. C.
Attorneys for Wolfsburger Transport-Gesellschaft m.b.H. as Amicus Curiae
40 Wall Street
New York, New York 10005

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF WOLFSBURGER TRANSPORT-GESELLSCHAFT m.b.H.

Introduction and Statement of Interest of *Amicus Curiae*

The decision of the Court of Appeals in this proceeding creates a loophole in the statutory framework which the Shipping Act, 1916, erected for the protection of shippers. The court below, finding a conflict between labor and ship-

ping objectives, would exempt "collective bargaining agreements as a class from section 15." (App. A. 35a).[1]

Alternatively, the Court of Appeals, believing the agreement here involved to be distinguishable from that in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261 (1968) ("*Volkswagenwerk*"), would exclude the Commission from jurisdiction under § 15 because of what it deems the unsuitability of the preapproval system of the Shipping Act to labor agreements (App. A. 35a-38a).

As a shipper, Wobtrans is seriously threatened by the construction placed on the Shipping Act by the court below. In *Volkswagenwerk*, this Court established that a multi-employer group, in implementing obligations assumed under a labor agreement, was subject to the controls which the Shipping Act placed on the exercise of collective power in the maritime industry. As a direct consequence of that decision, Wobtrans' parent, Volkswagenwerk Aktiengesellschaft, secured an immediate reduction in the heavy and disproportionate burden laid on its cargo by PMA. Since then, other multi-employer associations on every coast have had to recognize that when charges are levied on cargo or carriers, they must be "reasonably related to the service rendered." *Volkswagenwerk, supra*, 390 U.S. at 282. Automobiles have not been the only beneficiary of the Commission's supervisory jurisdiction: bananas, newsprint, container cargo, bulk cargo and the Puerto Rican carriers have all secured reductions in the burdens they otherwise would have borne.

If the decision below stands, shippers will be put back to where they were before *Volkswagenwerk*. Any employer group will be able to avoid the Commission's supervisory

[1] The references to appendices are to those attached to the petition for *certiorari* filed by the Solicitor General.

jurisdiction under §15 simply by having the union with which it negotiates become a signatory to its cooperative working arrangement. Whether or not such agreement qualifies for a "labor exemption" under the antitrust laws, the Commission will be ousted from its parallel jurisdiction. The temptation to multi-employer groups to restore the excessive burdens placed on outsiders or minority interests, like Wobtrans, will be irresistible.

Accordingly, Wobtrans seeks leave to file this brief as *amicus curiae* in order to persuade this Court not to permit this destructive construction to be placed on the Shipping Act, 1916.

Summary of Argument

Although purporting to respect the legislative intent underlying the Shipping Act equally with the statutory scheme relevant to labor and antitrust, the court below focuses solely on the interests of labor in reaching its conclusion that any collective bargaining agreement is automatically exempt from § 15 of the Shipping Act. Given no consideration whatsoever is the deleterious effect of that construction on the shippers, carriers, and other persons which the Shipping Act was designed to protect from the arbitrary exercise of collective power.

This Court, in *Volkswagenwerk*, overruling arguments similar to those accepted below, confirmed the jurisdiction of the Commission over labor-related agreements which raised "shipping" problems. Exercise of that jurisdiction by the Commission in the intervening nine years has not increased labor strife, and has proved immensely beneficial not only to automobiles, but to other carriers and cargoes, including container cargo, newsprint, bananas and the carriers in the Puerto Rican trade. The hidden benefits may be even greater because multi-employer groups are aware that all cooperative arrangements must pass the scrutiny of the Commission.

The addition of a union as a signatory to an agreement that otherwise would fall under § 15 is, in all respects, a "distinction without a difference." The effect on collective bargaining is the same, whether an agreement implementing the terms of a collective bargaining agreement follows, or is included in, the original negotiations. Equally, so far as the wards of the Shipping Act are concerned, the potential for discrimination is unaltered, so that the simplistic rule adopted below, making § 15 jurisdiction depend on the presence or absence of a union's signature, would leave them without protection against arbitrary collective action.

The collective bargaining agreements here involved raise "shipping," as distinct from labor, problems. In compelling non-PMA members to pay PMA assessments for PMA's costs, they are indistinguishable from the agreement involved in *Volkswagenwerk*. Since they could not claim a labor exemption from the antitrust laws, they should be regulated by the Commission under the Shipping Act, rather than the courts under the antitrust laws. The legislative intent was to give the Commission jurisdiction, in the first instance at least, over anticompetitive agreements in the maritime industry.

ARGUMENT

I.

The statutory scheme embodied in the Shipping Act is ignored and misunderstood by the court below.

As the court below correctly stated, its task was to "draw the line between shipping, labor and antitrust concerns in such a way that each statutory scheme remains effective." (App. A. 27a). But when the court came to draw such a line,

it wholly ignored the statutory scheme embodied in the Shipping Act. Although the construction it placed on the Shipping Act would substantially frustrate the legislative purpose behind its enactment, there is wholly lacking from the critical section of its opinion (App. A. 26a-41a) any analysis of that purpose, or any consideration of the effect upon the legislative scheme of the conclusions reached by the court. Not even lip service is paid to any of the various canons of statutory construction in resolving so basic a question as the jurisdictional reach of broad regulatory legislation such as the Shipping Act.

The lower court's sole focus was on how best to facilitate collective bargaining.[2] In its view, the type of regulation provided by the Shipping Act (in particular, the necessity for securing prior approval from the Commission before a § 15 agreement can be put into effect) poses grave obstacles to the rapid resolution of labor disputes (App. A. 28a). The court also dislikes the penalties imposed under §§ 15, 16 and 17 of the Act (App. A. 31a). Accordingly, it would exempt "collective bargaining agreements as a class from section 15." (App. A. 35a).

The breach such a construction opens in the regulatory powers of the Commission, and the implications for the

---

[2] Characteristic of the court's reasoning are the following observations culled from its opinion: Including negotiated labor agreements under § 15 "would place collective bargaining units in the shipping industry under more stringent federal regulation than other transportation industries and thus at a competitive disadvantage." (App. A. 28a). The FMC ruling "would make nearly impossible the maintenance or prompt restoration of industrial peace." *Ibid.* "[T]he delicate balance struck by the competing interests of labor and management" might be "upset by partial invalidation of the collective bargaining terms." (App. A. 30a). "Agreements between labor and management • • • cannot be fitted into the pre-implementation approval procedures of section 15 without ignoring the national policy fostering industrial peace through collective bargaining." (App. A. 42a).

wards of the Shipping Act, are left entirely unexamined. Such references to the Shipping Act as appear in the court's opinion, reflect a pervasive misunderstanding of the Act's salutary purposes, and of the important role of the Commission in carrying them out.

The court's fundamental misconception of the Commission is shown in its description of the Commission as an "agency whose primary concern is to foster trade competition" (App. A. 29a). Exactly the contrary is true. The Commission was created because Congress recognized that trade competition was not feasible in the maritime industry. Its role is to supervise the anticompetitive arrangements the statute deliberately permits. In the maritime industry, competitors are allowed to "moderate the rigors of competition," but the regulatory function of the Commission "insures that their immunity from the antitrust laws will be subject to careful control." *Federal Maritime Comm'n* v. *Akiebolaget Svenska Amerika Linien*, 390 U.S. 238, 241-43 (1968).

The court below also fell into error when it described the Shipping Act as having been passed because of "abuses in both domestic and foreign shipping caused by secret anticompetitive agreements between *shippers.*" (App. A. 11a) (emphasis supplied; footnote omitted). The shippers were not the instigators but the victims of abuses of anticompetitive agreements by third persons, and it was for their protection primarily that the Shipping Act was passed and the Commission created.[3]

[3] Instructive in this connection is the following excerpt from the Alexander Report (House Committee on the Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade), H.R. Doc. No. 805, 63d Cong., 2d Sess., 308 (1914), the genesis of the Shipping Act. *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 490 (1958); *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, *supra*, 390 U.S. at 275 (1968); *Federal Maritime Comm'n* v. *Seatrain Lines*, 411 U.S. 726, 736 (1973):

> "[M]any of the communications received from shippers * * * state that their experience has been to the effect that, once the combination of lines is established, it is apt to be used in an arbitrary and unfair way by favoring some large corporation or friend to the detriment of other shippers. Such discriminations and arbitrary treatment, it is believed, can only be eliminated by the establishment of some legally constituted authority which is empowered to hear complaints and to order the discontinuance of abuses." *See, also,* Alexander Report, *supra* at 418.

A very careful and comprehensive investigation by Congress of conditions in the maritime industry preceded the enactment of the Shipping Act. As summarized by a later Congress, that Act "rests on the assumption that the prosperity of our foreign commerce and the maintenance of a strong and independent merchant marine can best be secured through strict administrative surveillance of shipping conferences, agreements, and operations, insistence upon fair play and equal treatment for shippers large and small, protection of cargo and ports against unfair discrimination, and prevention of practices designed to eliminate or hamper independent carriers." H.R. Rep. No. 1419, 87th Cong., 2d Sess., 381 (1962).

Any interpretation placed on the Shipping Act should give effect to the legislative intent and carry out the purposes of the Act to the extent possible. Because the court below misconceived that intent and those purposes, it necessarily failed to do so. Wholly lacking from its opinion is any consideration of the effect of putting outside the regulatory power of the Commission all collective action to which a union makes itself a party. Equally absent is any concern with the consequences to the Congressional objectives of "fair play and equal treatment for shippers large and small [and] protection of cargo and ports against unfair discrimination." H.R. Rep. No

1419, 87th Cong., 2d Sess., 381 (1962). Otherwise, the court below could not have concluded that it had drawn the line "in such a way that each statutory scheme remains effective." (App. A. 27a).

II.

The Commission's exercise of its § 15 jurisdiction pursuant to the *Volkswagenwerk* case has benefited the maritime industry and has not prejudiced labor.

Before examining the implications to the Commission's jurisdiction and regulatory powers of the decision below, it is appropriate to examine the results of *Volkswagenwerk,* in which this Court insisted, in the face of arguments very similar to those relied on by the court below, that the Commission assume jurisdiction over the manner in which a multi-employer association allocated costs arising from a collective bargaining agreement.

The principal ground on which PMA contested such jurisdiction, both before the Commission and the courts,[4]

[4] In language strongly reminiscent of that employed below, PMA argued to this Court that the penalties imposed by the Shipping Act made its application to collective bargaining totally unacceptable: "Furthermore, a construction of Section 15 that suggests that the negotiation, administration and implementation of labor agreements are within Section 15 would necessitate numerous filings with the Commission. A Section 15 agreement cannot be implemented until it is approved. The potential penalty of one thousand dollars a day per person involved in an unapproved Section 15 agreement assures that maritime firms will proceed cautiously if there is any risk of Section 15 coverage. Thus, virtually every labor agreement, irrespective of whether it is ultimately held to be within the Section, would be filed and would risk fatal delay at the whim of a single objector." Brief for Pacific Maritime Association, Intervenor at 30, *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n,* 390 U.S. 261 (1968).

was that "the exclusive jurisdiction given the National Labor Relations Board over collective bargaining" precluded jurisdiction in the Commission. *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n,* 371 F.2d 747, 752 (D.C. Cir. 1966), *rev'd,* 390 U.S. 261 (1968).[5]

As *amicus curiae,* the International Longshoremen's and Warehousemen's Union ("ILWU") contended that it was "unrealistic to suggest that the financing of the Mech Fund is no part of the collective bargaining relationship between the parties."[6]

Mr. Justice Douglas of this Court shared the concerns of the ILWU, and dissented from this Court's holding that PMA's agreement was under § 15. He feared, he said, that this Court's construction of § 15 "will cause serious disruption in the process of collective bargaining in the maritime industry." *Volkswagenwerk, supra,* 390 U.S. at 295-96. He was apprehensive that "legitimate and speedy collective bargaining in the maritime industry" would be frustrated in consequence of the "undue and possibly lengthy freezing or stultification of solutions to troublesome labor problems while an intimate part of the proposed agreement is sent to the FMC for approval." *Volkswagenwerk, supra,* 390 U.S. at 312-13.

[5] The Commission, while not agreeing that it was precluded in all circumstances, stated that it would follow the interpretation the courts had given the Interstate Commerce Act:. "A showing has been required, before labor-management agreements have been held to be subject to the jurisdiction of the ICC, that they have some impact upon the competitive relationship of those entering into them." *Volkswagenwerk Aktiengesellschaft* v. *Marine Terminals Corp.,* 9 F.M.C. 77, 83 (1965), *aff'd sub nom., Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n,* 371 F.2d 747 (1966), *rev'd,* 390 U.S. 261 (1968). Not finding such impact, the Commission held itself to be without jurisdiction under § 15.

[6] Brief on Behalf of International Longshoremen's and Warehousemen's Union as *Amicus Curiae* in Support of Judgment Below at 83, *Volkswagenwerk, supra.*

The years which have elapsed since the decision in *Volkswagenwerk* have not confirmed these fears, but have conclusively demonstrated the value of this Court's construction of the Act. The necessity for securing the Commission's approval of assessments levied by the many multi-employer groups operating in the United States has proved immensely beneficial to many types of cargo and many carriers.

To the best of the knowledge of Volkswagen (which is active in many ports of the United States), during the entire period since the decision in *Volkswagenwerk,* no labor dispute has ever been either precipitated or prolonged because of the supervisory jurisdiction exercised by the Commission over the allocation of costs resulting from collective bargaining. Furthermore, the Commission has demonstrated an enormous flexibility in its procedures to ensure that its supervisory jurisdiction not interfere with the necessary collection of monies to meet collective bargaining obligations (App. A. 29a-30a).

At the same time, the carriers and the cargoes subject to the assessments levied by these powerful employer organizations have secured very substantial relief from disproportionate financial burdens which they otherwise would have been powerless to combat. Not only did automobiles secure some reduction in PMA's assessment after the decision in *Volkswagenwerk,*[7] but so did bulk cargo and con-

[7] The reduction PMA made in the burden placed on automobiles substantially reduced that burden, but fell far short of curing the original inequity: the burden on automobiles was left twice as great as that on breakbulk. Furthermore, the reductions made for bulk and container cargoes also aggravated the original injustice to automobiles. While Volkswagen did not initially oppose approval by the Commission of the revised PMA formula, it is now seeking to eliminate the discrimination which remains. The Commission's decision adverse to Volkswagen is now on appeal to the Court of Appeals for the District of Columbia Circuit. *Wolfsburger Transport-*

tainers.[8] Furthermore, these reductions have proved permanent and have been retained in funding the many collective bargaining agreements that have succeeded the one giving rise to *Volkswagenwerk.*

When the East Coast equivalent of PMA, the New York Shipping Association ("NYSA"), adopted a variant of PMA's tonnage tax, the Commission forced NYSA to modify the burden imposed on the exclusively containerized Puerto Rican movement, and the specialized carriers handling newsprint and automobiles.[9]

Not all the benefits to shippers and carriers from the Commission's § 15 jurisdiction over labor-related agreements are necessarily reflected in these litigated proceedings. The problems first encountered by PMA on the West Coast have since been duplicated in almost every port in the United States. Increasingly, a major burden in every port is the cost of compensating labor for lost work opportunities due to containerization and other forms of mechanization. Throughout the country, therefore, employer associations have had to reach agreement respecting how these new costs are to be met.[10] They have done so in full

Gesellschaft m.b.H. v. *Federal Maritime Comm'n,* Docket No. 74-1934 (D.C. Cir.), *appeal pending.* But while Volkswagen is challenging how the Commission has discharged its responsibilities under the Shipping Act, that in no way detracts from the value to Volkswagen, and other shippers and carriers, of the existence of that jurisdiction in the Commission.

[8] *Agreements No. T-2148 and T-2149, Pacific Maritime Association Assessment Agreements,* F.M.C. Docket No. 68-18 (1969).

[9] *Agreement No. T-2336—New York Shipping Association,* 15 F.M.C. 259 (1972), *aff'd sub nom., Transamerican Trailer Transport, Inc.* v. *Federal Maritime Comm'n,* 492 F.2d 617 (D.C. Cir. 1974); *see, also, New York Shipping Ass'n, Man-Hour/Tonnage Assessment Formula,* F.M.C. Docket No. 73-34 (1973).

[10] *E.g.,* Hawaiian Work Stabilization and Utilization Program ("WSUP"), Notice of Agreement Filed, 34 Fed. Reg. 6,268 (1969); New Orleans Steamship Ass'n, Notice of Agreement Filed, 37 Fed. Reg. 9,054 (1972); West Gulf Maritime Ass'n, Notice of Agreement Filed, 37 Fed. Reg. 18,582 (1972).

awareness that any agreement into which they enter must be filed with the Commission and will have to be justified if any type of cargo or any class of carrier complains that it has been unfairly burdened. But for the Commission's § 15 jurisdiction, it is safe to guess that disproportionate burdens would have been the norm. This is because, to the extent one type of cargo or carrier pays more, another type pays less. Inevitably, therefore, the cargoes or carriers dominating any particular employer group would have been tempted, absent an ombudsman, like the Commission, to shift the burden of these new costs to outsiders or minority members. But arbitrary exercise of power by these organizations has been held in check by the knowledge that whatever they did would have to pass the scrutiny of the Commission.

Precisely as Congress intended when it enacted the Shipping Act, powerful organizations exercising collective power have been prevented from engaging in discriminatory and arbitrary conduct because of the existence of the Commission, a "legally-constituted authority which is empowered to hear complaints and to order the discontinuance of abuses." Alexander Report (House Committee on the Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade), H.R. Doc. No. 805, 63d Cong., 2d Sess., 308 (1914).

III.

That a union signs an agreement otherwise subject to § 15 should not oust the Commission from jurisdiction.

The court below would take outside the jurisdiction of the Commission any agreement to which a union is a signatory. It justifies this interpretation as required by

the conflicting policy considerations, and as necessary to leave effective the statutory schemes relevant to shippers, labor and antitrust (App. A. 26a-27a).

But, in fact, there is no difference in the impact on shipping or labor of jurisdiction in the Commission over labor-related agreements and labor-management negotiated agreements. *Volkswagenwerk supra,* 390 U.S. at 309-11 (Douglas, *J.,* dissenting). If the policy considerations stressed by the court below were decisive, this Court would not have reversed the Court of Appeals in *Volkswagenwerk.*

The court below is not unaware of this fact. As the court guardedly acknowledges, were the choice its to make, it would undo the *Volkswagenwerk* decision for the very reasons it now seeks to limit that decision on technical grounds :

> "While we might prefer a rule that more adequately protects labor negotiations from the very real, if more distant, interference permitted in *Volkswagenwerk,* we see no valid purpose in extending that rule to encourage immediate disruption of negotiations." (App. A. 35a).

But, if one starts from the opposite premise, that a rule that adequately protects the wards of the Shipping Act is to be preferred, then no valid purpose is served in limiting it because one piece of paper, rather than two, is involved. Mr. Justice Harlan, in his concurring opinion in *Volkswagenwerk,* made exactly this point:

> "The fact that the 'labor agreement' and the 'assessment' agreement were on different pieces of paper is of course not critical. What is important is that the whole process raised both labor problems and distinct shipping problems. It would not be impossible for there to be a single agreement raising

some problems of Labor Board 'concern' and other, separate problems appropriate to Commission review." *Volkswagenwerk, supra,* 390 U.S. at 291 n.7.

Accordingly, the Second Circuit was clearly correct when it termed "a distinction without a difference" the fact that NYSA's assessment agreement, unlike PMA's in *Volkswagenwerk,* was part of a collective-bargaining agreement. *New York Shipping Ass'n* v. *Federal Maritime Comm'n,* 495 F.2d 1215, 1220 (2d Cir. 1974), *cert. denied,* 419 U.S. 964 (1974). It held that the jurisdiction established by *Volkswagenwerk* was unaffected by the fact that the agreement there was "solely among stevedoring contractors, terminal operators and carriers, while the ILA took an active part in negotiating and is a party to the agreement here at issue." In sharp contrast with the opinion below, the Second Circuit noted that:

"[T]he Commission was correct in concluding that its regulation of the assessment formula would have a minimal impact on the collective bargaining process, *while exempting the agreement from Shipping Act regulation would expose certain classes of shippers and carriers to potentially massive, inequitable cost increases". New York Shipping Ass'n* v. *Federal Maritime Comm'n, supra,* 495 F.2d at 1221-22.[11] (emphasis supplied).

[11] In unsuccessfully urging this Court to grant *certiorari* from the decision of the Second Circuit, the ILA made virtually the same argument adopted by the court below in this case. It claimed that the Second Circuit's decision placed "a complex and unnecessary burden on collective bargaining in an industry long known for its volatile labor relations," since an assessment formula agreed upon by the ILA and NYSA would lack "certainty until it is approved by FMC." ILA's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 9, *New York Shipping Ass'n* v. *Federal Maritime Comm'n,* 495 F.2d 1215 (2d Cir. 1974), *cert. denied,* 419 U.S. 964 (1974).

The concern which the Second Circuit expressed for the impact on certain classes of shippers and carriers of excluding NYSA's agreement from the Shipping Act finds no echo in the opinion of the court below. Furthermore, despite the preoccupation of the court below with collective bargaining, it nowhere explains why, so far as *labor* is concerned, the addition of the ILWU's signature is not "a distinction without a difference." Indeed, the court appears indirectly to concede that it cannot, and that what it is doing is elevating form above substance:

"An argument can be made, undoubtedly, that a separation is arbitrary which permits the FMC to oversee employer agreements intended to fulfill a collective bargaining obligation but denies this approval procedure for the bargaining agreement itself." (App. A. 35a).

Concern for the rights of labor must be balanced by concern for the shippers, carriers and other maritime interests intended to be protected by the Shipping Act. A union should not have the right, simply by making itself a party, to oust the Commission from jurisdiction and to strip maritime concerns of their statutory protection against abuses of collective power.

The conclusions reached by the Second Circiut, not those arrived at below, are more clearly consistent with *Volkswagenwerk* and with the obligations lying on the courts to give full effect to all relevant statutes:

"To be sure, the FMC has no concern with so much of the agreement as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters. But even though we fully accept that the ILA has an important stake in the existence of a workable and reliable

assessment formula, this does not relieve the FMC of its duty to determine whether the formula is reasonable in its effects on shipping. That inquiry is just as important as under the predecessor agreement and under the agreement in *Volkswagenwerk*. Similarly, the fact that the union has here succeeded in forcing NYSA to bargain over the assessment formula does not by itself take the formula out of the reach of § 15. The union's achievement demonstrates its power to force this concession, but it does not dilute the magnitude of problems raised by the formula for shippers and carriers." *New York Shipping Ass'n* v. *Federal Maritime Comm'n, supra,* 495 F.2d at 1220-21.

IV.

Section 15 jurisdiction should be held to exist wherever an agreement raises shipping problems.

A. The court below misapprehends the facts relevant to the "balancing test."

This brief so far has discussed the arbitrary division the court below would create between agreements within and without § 15 jurisdiction based on whether or not a union was a signatory (App. A. 35a). As we have pointed out, to the extent labor is concerned, whatever obstacles § 15 approval poses to collective bargaining are present whether or not the potential § 15 agreement is a labor-related agreement or a labor-management negotiated agreement, and experience has demonstrated that they are minimal. So far as persons subject to the Shipping Act are concerned, there is likewise no substantive difference. Therefore, the court's arbitrary "line" has no support in underlying factual differences and would provide a facile way for employer groups to evade the very valuable protection shippers and carriers have enjoyed since *Volkswagenwerk* against arbitrary collective action.

The court below, however, supplies an alternate ground for overturning the Commission's finding of jurisdiction under § 15, saying that even if it were to apply "the balancing test suggested by Justice Harlan, the agreement at issue would be exempt from filing." (App. A. 35a).

Mr. Justice Harlan, in his concurring opinion in *Volkswagenwerk,* rejected the simplistic view that collective bargaining agreements were automatically exempt from § 15 and called the problem one of "line drawing." *Volkswagenwerk, supra,* 390 U.S. at 284. He was also critical of the opposite position that any agreement which "affects competition" came within the jurisdiction of the Commission, observing that "any significant multi-employer agreement on economic matters 'affects competition' with respect to prices and services to the public." *Volkswagenwerk, supra,* 390 U.S. at 287.

Acknowledging necessarily some labor exemption from the filing requirements of §§ 15, 16 and 17 of the Shipping Act, as well as from the antitrust laws, Mr. Justice Harlan found it unnecessary to delineate it precisely, because "the assessment agreement before us is *not* immune or exempt, for it raises 'shipping' problems logically distinct from the industry's labor problems • • •." *Volkswagenwerk, supra,* 390 U.S. at 287 (emphasis in original). He found such "shipping" problems in the effect that PMA's allocation of the cost burden of mechanization had on competition among terminal companies for the trade of shippers of Volkswagen vehicles.

The court below reads *Volkswagenwerk* too narrowly. Mr. Justice Harlan did not find the agreement there involved to be subject to the Commission's supervision because it "produced discriminatory tariffs—a primary concern of the Act—for the shipping of automobiles" (App.

A. 35a-36a). There were no tariffs involved.[12] Equally, § 15 jurisdiction did not rest on the claim of discrimination. As Mr. Justice Harlan pointed out, § 15 makes no distinction between "good agreements" and "bad ones." *Volkswagenwerk, supra,* 390 U.S. at 285 n.3.[13]

Turning to the facts of the present case, the agreements here involved go beyond "wage, fringe benefit and work stoppage terms" (App. A. 36a). Among other things, these agreements would compel non-PMA members to pay the same dues and assessments to PMA on the same basis as PMA members (App. A. 5a-6a n.6). No difference suggests itself between an agreement allocating the cost of a mechanization agreement to PMA and one allocating the cost of the operations of PMA. If one is a "shipping" problem, so is the other. Equally, it is difficult to conceive what legitimate interest a union has in how PMA, an employer organization, meets its expenses.

In short, there appears to be clearly present here "'shipping' problems logically distinct from the industry's labor problems." These agreements, therefore, do not "fall neatly into either the Labor Board or Maritime Commission domain; * * * [they] raise issues of concern to both." *Volkswagenwerk, supra,* 390 U.S. at 286.

---

[12] The charges made to shippers of automobiles by terminal operators were the product of private negotiation, and not the subject of schedules of charges. Had tariffs been involved, the Commission would not have refused jurisdiction, as it did, because there was no evidence of "an additional agreement by the PMA membership to pass on all or a portion of its assessment to the carriers and shippers served by the terminal operators." *Volkswagenwerk Aktiengesellschaft* v. *Marine Terminals Corp., supra,* 9 F.M.C. at 83. Charges in printed tariffs would have supplied such evidence.

[13] This point was also made in the Brief for the United States: "We stress that the Section 15 question in this case is not whether the assessment agreement should have been approved or disapproved, but whether the agreement—good or bad—is unenforceable because it has not been filed with the Commission. We think so." Brief for the United States at 17, *Volkswagenwerk, supra.*

B. Agreements raising shipping problems and not entitled to a "labor exemption" should be subject to Commission jurisdiction.

While the court below may have taken too restrictive a view of the Commission's jurisdiction, the Commission itself may have taken too expansive a view.

The Commission appears to assume the existence of jurisdiction in itself over all collective bargaining agreements in the maritime industry unless the agreement would be covered by the "labor exemption" which statutes and court decisions have carved out of the antitrust laws (App. A. 40a). But there is no statutory basis for such an assumption. Section 15 is not an unlimited grant of jurisdiction. *Cf., Federal Maritime Comm'n* v. *Seatrain Lines, Inc.,* 411 U.S. 726 (1973). It embraces only the agreements described therein.[14] This means that "shipping problems" must be present before jurisdiction attaches. If they are, then the "labor exemption" test is clearly relevant.

Certainly, where a union lends its name to what is, in effect, an employer-inspired agreement, the Commission

---

[14] Section 15 (46 U.S.C. § 814) reads in part:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

should have jurisdiction. *Cf., Allen Bradley Co.* v. *Local 3, Int'l Brotherhood of Electrical Workers,* 325 U.S. 797, 809-11 (1945); *Connell Co.* v. *Plumbers & Steamfitters,* 421 U.S. 616, 622-23 (1975); "[B]enefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *United States* v. *Women's Sportswear Manufacturers Ass'n,* 336 U.S. 460, 464 (1949). These principles support the Commission in requiring that, to take an agreement outside § 15, it must be the result of collective bargaining carried on in good faith, and not the product of a conspiracy with management.

The other criteria as to when a labor exemption exists are also helpful in determining the presence of shipping—as distinct from labor—interests.[15] If the agreement in question would not qualify for an exemption under the antitrust laws, and if it "raises 'shipping' problems logically distinct from the industry's labor problems," it would be inconsistent with the statutory schemes underlying the antitrust and shipping laws for the Commission to lose its jurisdiction over such agreement to the courts.

The conclusion of the court below that the anti-trust laws should apply because this is preferable from the viewpoint of labor and the unions ignores the fact that Congress has made a deliberate determination that in the § 15 area, the maritime industry should not be controlled by the courts under the antitrust statutes, but, at least initially, should be regulated by the Commission. *Federal Maritime Comm'n* v. *Akiebolaget Svenska Amerika Linien, supra,* 390 U.S. 238, 241-43 (1968); *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966); *Far East Conference* v. *United States,* 342 U.S. 570 (1952); *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932). Exclusion of

[15] *Local 189, Meat Cutters* v. *Jewel Tea Co., Inc.,* 381 U.S. 676 (1965); *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965).

the Commission must necessarily frustrate the legislative purpose to subject to the general supervision of the Commission all conditions of water transportation which affect "shipping" interests.

From the viewpoint of the shippers, carriers and other maritime interests covered by the Shipping Act, the very circumstances that make that statute unappealing so far as labor is concerned are precisely its advantages. The necessity for securing prior approval of a § 15 agreement ensures immediate protection against arbitary impositions through the collective power of the employer associations and unions acting in concert; whereas, under the antitrust laws, review may come late, injunctions are unavailable, and damages may be too speculative to recover. Furthermore, under the antitrust laws, private parties must bear the burden of litigating the matter unless and until it is decided in their favor. For many small companies, the amount involved might fall far short of justifying the expense; and even for large companies, the potential costs might act as a very strong deterrent. By contrast, the statutory scheme embodied in the Shipping Act makes the Commission the guardian of the maritime industry and permits inequitable agreements to be challenged in administrative proceedings, in which participation should be less costly and time-consuming than the litigation of a complex antitrust case.

Because the antitrust laws have, to a large extent, been suspended so far as the maritime industry is concerned, more protection—not less—is needed from collective action joined in by powerful labor unions. Persons in the maritime industry are parties to a multitude of cooperative working relationships. When, to the collective power they enjoy, is added the power lying at the command of the powerful maritime unions, any opponent is put at an enormous dis-

advantage. Only a Government agency is strong enough to resist such collective pressures.

Experience to date belies the claim that Commission jurisdiction will radically interfere with collective bargaining. No labor unrest has ever been traced to the pendency for many years before the Commission of the various proceedings involving assesments for the West Coast Pay Guarantee Plan and for the East Coast's Guaranteed Annual Income, nor, in this case, has the jurisdictional dispute respecting a collective bargaining agreement adopted almost four years ago apparently led to any strikes or other labor unrest.

In the *Volkswagenwerk* case, the court below also held that the remedy, if any, against abuse by PMA of its collective power lay in the antitrust laws:

> "We are not to be taken as closing our eyes to [Volkswagenwerk AG's] claim that it is the target of a combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter. That issue is not for the Commission or the court in this proceeding. It suffices to say that agreements not approved by the Commission are not protected from attack under the antitrust laws." *Volkswagenwerk, supra,* 371 F.2d at 759 n.13.

This Court rejected that view of the law then; it should do so again.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Dated: May, 1977.

Respectfully submitted,

HERBERT RUBIN
CECELIA H. GOETZ
ALAN A. D'AMBROSIO
HERZFELD & RUBIN, P.C.
Attorneys for Wolfsburger Transport-Gesellschaft m.b.H. as Amicus Curiae
40 Wall Street
New York, New York 10005